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JAMES H. McKENN
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IN THE

Supreme Court of the United States.

October Term, 1906.

THE UNITED STATES, *Appellant*,
v.
LEWIS E. BROWN, } No. 283.

LEWIS E. BROWN, *Appellant*,
v.
THE UNITED STATES. } No. 284.

(20,240 and 20,241.)

REPLY BRIEF ON BEHALF OF LEWIS E. BROWN.

Replying to certain portions of the brief on behalf of the United States, counsel for the claimant, Lewis E. Brown, submit the following:

1. The statement at p. 2 (bottom), that the regiment "was mustered out by order of the President" on May 25, 1899, implies an order dissolving the entire regiment and terminating the existence of that organization. This is misleading. The record does not show any order for the muster out of the regiment in whole or in part.

An order of the President may be presumed as to the muster out of all those who were in fact mustered out, but not as to the claimant, who was not among those mustered out. On the contrary, the War Department, acting presumably for the President, expressly refused to muster out the claimant.

2. The argument, at pp. 5 to 27 inclusive, is in support of Benét's proposition that "Regular officers detailed, and sitting, as volunteer officers of higher grades, may try volunteers, but only when holding commissions in the volunteer service."

That proposition is found in the 6th edition of Benét, published in 1868, wherein the full text of the Articles of War then in force is set forth (pp. 391–413). Article 97 then required that courts martial for the trial of officers of militia should be "composed entirely of militia officers," but did not in terms declare officers of the regular army incompetent. That declaration was inserted in the revision of 1874.

There is, therefore, no cause for the alarm expressed at p. 27. The contention of the claimant does not involve Article 97 as it stood prior to 1874.

3. The statement at p. 32, that the affirmance of the decision of the Court of Claims " will invalidate a vast number of sentences imposed by courts martial similarly constituted " and " will be productive of unspeakable confusion and chaos, and serve no good purpose," is an extraordinary application for judicial repeal of the statutory provision known as the 77th Article of War; or else it rests upon the theory that repeated violations of a statute may operate eventually to obliterate or nullify it, and that the supine submission of other victims of such illegal practices has operated to deprive the claimant of his rights under an Act of Congress.

4. At pp. 34 and 37 (bottom) the learned counsel contend that "action by the commanding officer was a part of the proceedings which constituted the trial of the accused;" referring to such action after, and concerning, the acquittal. But counsel fail to explain why these subsequent proceedings, including not only the action of the commanding officer, in the absence of the accused and every member of the court, but also the action of the members of the court

martial when they met on December 6 and in open court read the order for reconsideration, if part of the trial, were had in the absence of the accused and without notice to him.

Benét says (p. 170): "When a court is reconvened for a substantial amendment, the reconvening order should be spread upon the record, which should also show that at least five members of the court, the judge advocate, *and the accused*, were present, and that the amendment was then made to conform to, and express, the truth in the case. But a merely clerical error may be amended by the court without having the accused present."

Such action by the court, in the absence of the accused, was "a departure from established modes of procedure," and therefore "invalid for any purpose."

Windsor *v.* McVeigh, 93 U. S., 274.
Dynes *v.* Hoover, 61 U. S., 65.

5. The statements at p. 35 (bottom) and p. 50, as to the indorsement, are qualified by the finding of the Court of Claims (R., 10) that "It does not affirmatively appear that this indorsement was read to the court martial." All that was read to or considered by the court was the order for reconsideration, as appears in Finding III (R., 8).

6. The suggestion at p. 41, as to a "quotation" from Clode, is uncalled for. In our brief for the claimant (p. 11, bottom) we did not quote Clode, but merely stated the substance of his opinion.

7. The statement at p. 54, that by the Act of March 2, 1899, Congress put an end to the volunteer force, is incomplete without the further statement that Sections 12 and 13 of the Act provided for the continuance of the volunteer force until July 1, 1901 (30 S. L., 980, 981).

8. At p. 55 counsel admit that an officer "held under military control and discipline by competent authority" was "retained" in the service.

"Ever since February 17, 1899, the claimant has been able, willing and ready to perform the duties of his rank as first lieutenant" (R., 9, bottom). If at any time before he was mustered out by operation of law the War Department had seen fit to acknowledge the invalidity of the sentence of dismissal it could and would have issued orders to him, and his own contention as to the invalidity of the sentence kept him subject to such orders. The fact that the acknowledgment by the War Department of the invalidity of the sentence has been postponed until such acknowledgment be required under the judgment of this court, merely indicates that the Department failed to exercise the "military control and discipline" under which the claimant was held since the muster out of the other officers of his regiment.

9. As to the statement, at p. 55, that the claimant contends that the War Department "possesses exclusively the power to discharge the claimant," we refer to our original brief (pp. 32, 33) where a correct statement of our contention will be found. The power referred to was, by Congress, vested in the President, who acts in the matter through the War Department.

Respectfully submitted,

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